IN THE

Supreme Court of the United States

October Term 1978

No. 77-1258

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its Attorney General,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR PETITIONER THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS

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OPINION BELOW

The Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment, and Memorandum opinion, of the District Court for the Fourth Judicial District, State of Minnesota (App. 123) is unreported. The opinion of the Supreme Court of the State of Minnesota (App. 154) is reported at —— Minn. ——, 262 N.W. 2d 358. The Order of the Supreme Court of the State of Minnesota denying petition for rehearing and amending the original opinion (App. 197) is unreported.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was made and entered on December 14, 1977 (App. 198). The petition for a writ of certiorari was filed on March 13, 1978, and was granted on May 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the National Bank Act (12 U.S.C. §85) preempts Minnesota Statutes §48.185 and prohibits the State of Minnesota from regulating the interest rate charged Minnesota residents under a bank credit card program conducted within the State of Minnesota by a national bank having its principal place of business in a foreign state.

2. Whether the Petition for Writ of Certiorari was filed within 90 days after the entry of judgment by the Minnesota Supreme Court as required by 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions involved are Article VI, Clause 2 of the United States Constitution (Add. 1);[1] the National Bank Act, Title 12, United States Code, Section 85 (Add. 1); and, the Minnesota Bank Credit Card Act, Minnesota Statutes 1976, Section 48.185 (Add. 2).

STATEMENT OF THE CASE

Petitioner is a national banking association established in the State of Minnesota. Since 1968, it has operated a bank credit card program (the "Marquette BankAmericard [VISA] program") in the State of Minnesota. Respondent, First of Omaha Service Corporation, is a wholly-owned subsidiary of the First National Bank of Omaha ("the Omaha Bank"), a national banking association established in the State of Nebraska, which also operates a bank credit card program (the "Omaha BankAmericard [VISA] program") in the State of Minnesota.

Petitioner brought suit in May, 1976, under Minn. St. §48.185 (Add. 2) to enjoin respondent and its parent, the Omaha Bank, from enrolling Minnesota residents in the Omaha BankAmericard [VISA] program, without conforming its interest rate structure to that established by the Minnesota Bank Credit Card Act, Minn. St. §48.185 (Add. 2). In addition to its claim for injunctive relief, petitioner also sought money damages incurred as a result of respondent's violation of Minn. St. §48.185 and for attorneys' fees as pro-

[1] Addendum, *infra*, hereinafter referred to as "Add. ——."

vided under Minn. St. §48.185, Subd. 7 (Add. 5). *See,* Complaint (App. 6).[2]

Under the provisions of the aforesaid statute, a state or national bank, wherever located, when operating a bank credit card program in the State of Minnesota and soliciting Minnesota residents, is limited to imposing on credit card balances of Minnesota residents an annual interest rate of not more than 12 percent per annum, computed on the "average daily balance" of the customer's account. The respondent, however, has sought and continues to seek to offer the Omaha BankAmericard [VISA] program in the State of Minnesota with an annual interest rate of 18 percent on the first $999.99 (computed at 1 1/2 percent per month on the previous balance of the customer's account) pursuant to Nebraska law.[3]

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[2] On June 12, 1978, petitioner entered into an agreement for the sale and transfer of its BankAmericard [VISA] program. The actual closing of the transfer is subject to various conditions and is still several weeks away. Until such time as the aforesaid executory agreement becomes final, petitioner's position in the case remains unchanged. Upon the anticipated consummation of the sale and transfer of its BankAmericard [VISA] program, petitioner will no longer be in a position to pursue its claim for injunctive relief herein but will retain its causes of action for damages against respondent arising out of the violation of Minn. St. §48.185, and for attorneys' fees as provided under Minn. St. §48.185, Subd. 7.

Since petitioner's remaining causes of action for damages and attorneys' fees are dependent in part upon the constitutionality of Minn. St. §48.185, the determination of whether the National Bank Act (12 U.S.C. §85) preempts the interest rate requirements of Minn. St. §48.185 remains a "live" issue between petitioner and respondent and one in which petitioner has "a legally cognizable interest in the outcome." *Powell v. McCormick,* 395 U.S. 486, 496-500 (1969).

[3] From the date of entry of the initial injunction in this matter on December 22, 1976 (App. 65), until just shortly before writ of certiorari was granted, the Omaha Bank and respondent chose not to conduct the Omaha BankAmericard [VISA] program in the State of Minnesota even though there has been no restraint on their operation of such program as long as they complied with the interest requirements of Minn. St. §48.185. In May, 1978, the Omaha Bank and respondent commenced a new solicitation of the Omaha BankAmericard [VISA] program in the State of Minnesota with an interest rate of 12 percent per annum and in apparent compliance with Minn. St. §48.185 (Add. 2). Through their counsel, the Omaha Bank and respondent have stated that it is their intention "to charge Nebraska rates as soon as the courts have indicated that it may do so." (Add. 6).

At the time of the commencement of the suit, the Omaha Bank and its wholly-owned subsidiary, respondent, sought to conduct bank credit card operations in the State of Minnesota under Nebraska interest rates because of the opportunity afforded by the rate differential to establish a cardholder base in the State of Minnesota. Under the Minnesota Bank Credit Card Act banks are limited to charging an annual interest rate of 12 percent but are permitted to charge an annual membership fee of $15. Prior to the entry of the injunction herein, the Omaha Bank and respondent proceeded to solicit Minnesota residents for purposes of enrolling them in the Omaha BankAmericard [VISA] program by offering the credit card "free." By offering the card "free," rather than with a membership fee, the Omaha Bank hoped to attract many Minnesota residents to the Omaha BankAmericard [VISA] program, who would otherwise have been required under Minnesota law to pay a fee for the privilege of obtaining a BankAmericard. The Omaha Bank could afford to offer the card "free" because of the Nebraska annual interest rate of 18 percent, whereas Marquette and other banks, limited to the 12 percent interest rate under Minnesota law, could not operate profitably without charging a membership fee. *See,* Harris Affidavit (App. 45).

Petitioner commenced its action in Hennepin County (Minnesota) District Court; however, the Omaha Bank sought to have the matter removed to the United States District Court for the District of Minnesota. Following petitioner's voluntary dismissal of the Omaha Bank for procedural reasons

(App. 25), the United States District Court remanded the matter back to the state court for lack of federal removal jurisdiction (App. 49). 422 F. Supp. 1346 (D. Minn. 1976). Thereafter, petitioner brought a motion for partial summary judgment before the Hennepin County (Minnesota) District Court ("the District Court") to have the Omaha BankAmericard [VISA] program declared in violation of Minn. St. §48.185, and, to permanently enjoin respondent from engaging in any activity in connection with the offering or operation of said credit card program in further violation of the statute (App. 89). In defense to this motion, respondent raised the federal question presented herein, *i.e.* whether the National Bank Act, 12 U.S.C. §85, preempts Minn. St. §48.185 and enforcement of the provisions of such statute against the Omaha BankAmericard [VISA] program. Upon being notified of this constitutional challenge to Minn. St. §48.185, the Attorney General for the State of Minnesota intervened as a party plaintiff and joined in petitioner's prayer for a declaratory judgment and permanent injunction (App. 81).

Section 85 of the National Bank Act (12 U.S.C. §85) provides in pertinent part:

> "Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (Add. 1).

Respondent argued that this section gives a national bank, located in Nebraska but doing business in Minnesota, the

right to charge in Minnesota the highest rate of interest permitted by the laws of the State of Nebraska; and, that 12 U.S.C. §85 preempts that portion of Minn. St. §48.185 which makes Minnesota bank credit card interest rates applicable to foreign banks, including national banks, doing business in the State of Minnesota.[4]

The District Court rejected the above argument of federal preemption and entered partial summary judgment in behalf of petitioner and against respondent on February 18, 1977. The District Court held, among other things, that (1) nothing in 12 U.S.C. §85 preempts the application and enforcement of Minn. St. §48.185 against respondent and the Omaha BankAmericard [VISA] program; (2) the Omaha BankAmericard [VISA] program was in violation of Minn. St. §48.185 as long as it provided for the collection of interest in excess of

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[4] That portion of Minn. St. §48.185 which makes Minnesota bank credit card interest rates applicable to foreign banks doing business in Minnesota provides as follows:

> Subd. 6. *This section shall apply to all open end credit transactions of a bank* or savings bank *in extending credit under an open end loan account* or other open end credit arrangement *to persons who are residents of this state, if the bank* or savings bank *induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state.* A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:
>
> (a) that the law of another state shall apply;
> (b) that the person consents to the jurisdiction of another state; and
> (c) which fixes venue
>
> is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction. (Emphasis added.) (Add. 2).

1 percent per month (12 percent annual rate); and (3) respondent is permanently enjoined from engaging in bank credit card activities in the State of Minnesota in violation of Minn. St. §48.185 (App. 123).[5]

The District Court in rejecting respondent's argument that 12 U.S.C. §85 preempted Minn. St. §48.185 and the operation thereof, stated:

> "Since the founding of our republic, Congress, by its legislation, has allowed states to set their own interest rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This court, in its Order of December 22, 1976, said:
>
> 'To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial custom of so long a standing in our Republic.'" (App. 134).

On appeal to the Minnesota Supreme Court, respondent again argued that 12 U.S.C. §85 preempted the application of Minn. St. §48.185 to the Omaha BankAmericard [VISA] program. In an opinion filed on November 10, 1977 (App. 154), the Minnesota Supreme Court reversed the District Court decision on the basis of federal preemption of Minn. St. §48.185 by Section 85 of the National Bank Act (Add. 1). The Minnesota Supreme Court did not find any dis-

[5] As previously stated in footnote 2, *infra*, petitioner's claims for damages and attorneys' fees against respondent remain for consideration by the District Court following this appeal.

harmony between Minn. St. §48.185 and the objectives of Congress in enacting §85 of the National Bank Act. To the contrary, the Court conceded that its decision to permit the Omaha BankAmericard program to collect 18 percent interest in violation of Minn. St. §48.185 would result in an advantage to out-of-state national banks which is inconsistent with the purposes of the National Bank Act:

> "Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, *an advantage which appears to be contrary to the original purpose in adopting this particular section [85] of the National Bank Act.*" (Emphasis added.) (App. 168).
>
> * * *
>
> "A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. *The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.*" (Emphasis added.) (App. 168).

The Minnesota Supreme Court's refusal to enforce Minn. St. §48.185 against the Omaha BankAmericard [VISA] program was *not* out of a belief that the state statute was an obstacle to the purposes of §85 of the National Bank Act. Rather, the Minnesota Supreme Court was reluctant to reach a result which it thought would be inconsistent with two United States Court of Appeals' decisions involving the op-

eration of bank credit card programs in the State of Iowa by out-of-state national banks. *See, Fisher v. First National Bank of Omaha,* 548 F. 2d 255 (8th Cir. 1977) and *Fisher v. First National Bank of Chicago,* 538 F. 2d 1284 (7th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977). The Minnesota Supreme Court gave the following explanation for its decision:

> "Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher." (App. 165).
>
> * * *
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> "In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 U.S.C. §85 precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. *If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.*" (Emphasis added.) (App. 165).

In view of the *Fisher* cases, *supra,* the Minnesota Supreme Court reversed the District Court, held that 12 U.S.C. §85

preempted Minn. St. §48.185 and that based on §85, a national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Three justices of the Minnesota Supreme Court entered dissents to the majority opinion (App. 169). Justice Scott, writing for the minority, stated:

> "I respectfully dissent. The original purpose of 12 U.S.C.A., §85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was intended to put 'national banks on a equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders.' First National Bank in Mena v. Nowlin, 509 F. 2d 872, 880 (8th Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.
>
> The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act." (App. 169).

On December 8, 1977, the Minnesota Supreme Court denied a petition for rehearing but granted petitioner a stay of judgment pending this application for writ of certiorari (App. 197). Judgment was entered on December 14, 1977 (App. 198). The petition for writ of certiorari was filed on March 13, 1978 (89 days following entry of judgment), and was granted on May 22, 1978.

SUMMARY OF ARGUMENT

The decision of the Minnesota Supreme Court that §85 of the National Bank Act preempts Minn. St. §48.185, regulating the interest rates which state and national banks, wherever located, may charge when engaging in bank credit card transactions with Minnesota citizens in the State of Minnesota is contrary to the doctrine of maintenance of competitive equality between state banks and national banks adopted by Congress in enacting §85 of the National Bank Act, conflicts with the legislative history of §85 of the National Bank Act, and ignores the plain meaning of the language found in §85 of the National Bank Act. Section 85 of the National Bank Act grants to each state the right to regulate interest rates which may be charged its residents by state and national banks doing business in such state. Minn. St. §48.185, which sets such interest rates, is not preempted by §85 of the National Bank Act, does not conflict with or frustrate the purposes of the National Bank Act, and enforcement thereof against respondent will not impose an undue burden on the performance or efficiency of national banks.

I

The first clause of 12 U.S.C. §85 provides:

> "Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the state . . . where the bank is located . . . and no more . . . ." (Add. 1).

This portion of §85 permits a national bank *located* in a state to charge on loans *made* in such state the rate permitted to *general lenders* under the general usury laws of the state.

The second clause of 12 U.S.C. §85 provides:

> ". . . except that where by the laws of any state a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this chapter." (Add. 2).

This clause permits a national bank *located* in a state to charge on loans *made* in that state the highest rate permitted to state banks in such state.

Congress in adopting the foregoing language of §85 sought to maintain competitive equality between state and national banks in the charging of interest rates. This Congressional policy was first confirmed by the United States Supreme Court in *Tiffany v. Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873), when this Court held that a national bank in Missouri could charge up to 10 percent per annum, the rate of interest permitted general lenders under the laws of the State of Missouri, and was not restricted to the lesser rate of 8 percent allowed state banks under Missouri law.

Section 85, however, was aimed at intrastate competition, *i.e.* between national banks located in the state and other local banks *in that state*:

> "The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and *equality* is carefully secured *with local banks*." (Emphasis added.) *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900).

This same emphasis on *intra*state competitive equality between national banks and other local banks is seen in the other leading cases cited under §85. *See, e.g., First National Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F. 2d 855 (6th Cir. 1972); *Hiatt v. San Francisco National Bank*, 361 F. 2d 504 (9th Cir. 1966). Section 85 says nothing which could reasonably be construed as providing a rule as to what interest rate may be charged by national banks in the context of *inter*state transactions. The federal statute is simply silent on the issue.

II

There is nothing in the legislative history of the National Bank Act to indicate that §85, enacted over 100 years ago, was intended in any way to cover the situation of the interstate transactions present here where a national bank established in Nebraska is competing with banks and lenders in Minnesota. Indeed, Congress in enacting §85 of the National Bank Act did not contemplate that national banks would do business in states other than the state in which they were located or chartered. Section 11 of the Currency Act of 1863 (the forerunner of the National Bank Act of 1864) required that a national banking association must conduct its "usual business . . . in banking offices located at the places specified . . . in its certificate of association, and not elsewhere." Act of February 25, 1863, Ch. 58, §11, 12 Stat. 668 (1863). National banks at the time of adoption of the National Bank Act of 1864 were, therefore, confined to transacting their general or usual business in the city, town, or village in the State, Territory or District specified in their organizational certificates.

In order to ascertain the intent of Congress in adopting §85 of the National Bank Act, the Senate debates on §30 of the National Bank Act of 1864 (now §85) are revealing. *See, Congressional Globe*, 38th Congress, 1st Sess., 2123-2127 (1864). One group of senators, led by Senator Grimes of Iowa, desired to prevent national banks from charging higher interest rates than state banks and thereby gaining a major competitive advantage. Another group of senators, led by Senator Sherman of Ohio, asserted that national banks should be allowed to charge that interest rate which any individual or other institution in the state was allowed to charge, without regard to any limitation which might be placed on state banks. The Sherman group was intent on making it impossible for states to pass legislation hostile to national banks in the area of interest rates. The issue was finally settled by the compromise version of §30 of the 1864 Act (now §85) which emerged permitting national banks to charge the highest rate of interest permitted general lenders in the state where the national bank was located and also allowing national banks to charge the highest rate allowed state banks in such state if that rate was higher.

It is apparent, however, from examining the various draft changes in the statute and the report of the debate in the Congressional Globe that none of the senators contemplated that national banks would open offices in other states or transact business across state lines on an interstate basis. Hence, the legislative history of §85 of the National Bank Act reveals a total lack of consideration of what interest rates are to be

charged in the context of interstate transactions by national banks.

III

The plain language of Section 85 supports the conclusion that §85 is silent on the issue of what interest rates may be charged by a national bank when it crosses state lines. The first clause of §85 must be read to refer to the interest rate which may be charged by a national bank on loans *made* where the bank is *located* and would allow a national bank to charge the highest interest rate allowed to general lenders by the laws of the state in which the national bank is "located." The word "located" used in §85 when read in conjunction with the word "established" used in 12 U.S.C. §81 means the state where the national bank is chartered and transacts its general banking business. The second clause of §85 permits a national banking association "organized" or "existing" in any state to charge the highest rate permitted state banks in such state, if the rate for state banks is higher than the interest rate allowed general lenders in such state. Neither clause or any other clause in §85 of the National Bank Act addresses the issue of what interest rate is permitted of national banking associations "located", "organized", or "existing" in one state and doing business in a second state. The use of such words as "located", "organized", and "existing" in §85 all appear to have reference to the same thing, that is, the state where the national bank was chartered and has its general place of business.

IV

The majority of the Minnesota Supreme Court failed to perceive that the instant case is one of first impression and involves considerations entirely different than those addressed

by the Eighth and Seventh Circuits in the *Fisher* cases. What is at stake in the instant case is the determination of whether §85 of the National Bank Act is to be construed as permitting competitive inequality between national banks established in different states but conducting business in the same state. It also involves a determination of whether §85 of the National Bank Act preempts the state from enacting nondiscriminatory legislation applicable to *all* banks operating bank credit card programs within its borders. Because of its reliance on the *Fisher* cases, the Minnesota Supreme Court reached a result herein which is contrary to its own view of the purposes of the National Bank Act. Its decision was based not upon the merits of the issues presented nor upon the federal preemption standards established by this Court, but upon a misguided notion of how the Eighth Circuit Court of Appeals would have decided the matter.

The appellate courts in the *Fisher* cases sought to justify their decisions on the theory that the "most favored lender" doctrine announced in *Tiffany v. National Bank of Missouri, supra*, should be expanded to *interstate transactions* so as to give national banks the privilege of selecting between the highest rate of interest permitted by the state in which it has its principal place of business, or, the highest rate of interest permitted by the state in which the bank transacts business. This construction of §85 completely ignores the doctrine of maintenance of competitive equality between state and national banks with respect to interest rates which Congress sought to effect in enacting §85.

The Minnesota Supreme Court decision, if allowed to stand, would permit respondent, and its principal, the Omaha Bank, to operate a BankAmericard [VISA] program in Minnesota at an 18 percent interest rate per annum, while Minnesota

state banks, and national banks located in Minnesota, are limited to an annual interest rate of 12 percent. Respondent can operate profitably at 18 percent without the need to impose a membership fee. Minnesota state banks and national banks located in Minnesota are limited to imposing an annual interest rate of 12 percent plus a $15 annual membership fee. National banks located outside of the State of Minnesota by offering their bank credit card "free" (without a membership fee of $15 per annum) have a substantial, illegal competitive advantage over petitioner and all other state and local national banks operating bank credit card programs in this state.

To construe §85 of the National Bank Act so as to find in the plain language of that Act a rule that national banks located in a high-interest-rate state may, by virtue of the National Bank Act, export such rates to a low-interest-rate state completely ignores the policy of "competitive equality" between national and state banks as to interest rates which Congress so carefully built into §85 of the Act.

The construction given by the Minnesota Supreme Court of §85 of the National Bank Act not only creates competitive inequality between national banks in other states with higher interest rates and state banks located in a low-interest-rate state, but it also results in creating competitive inequality between national banks located in a high-interest-rate state and national banks located in a low-interest rate state.

V

Section 85 fails to provide a rule as to what interest rates may be charged by national banks in *inter*state transactions. Absent a reference in §85 to the rate of interest which a national bank may charge on loans made in a state other than the state where it is located, standard conflict of laws rules govern. The Minnesota legislature, in enacting Minn. St.

§48.185 (Add. 2), has in effect determined that, as a fundamental policy of the State of Minnesota, banks (whether state, national or savings banks) operating bank credit card programs in the State of Minnesota and extending credit to Minnesota residents are to be limited to a rate of 12 percent per annum imposed on the average daily balance of the cardholder's account and a membership fee of $15. Minn. St. §48.185, Subd. 6, expressly provides that the Minnesota statute, including its rate provisions, shall govern bank credit card transactions between a bank and persons who are residents of the State of Minnesota, if the bank induces such persons to enter into such arrangements by continuous systematic solicitation either personally or by an agent or by mail, retail merchants and banks within the State of Minnesota are contractually bound to honor credit cards issued by the bank, and the goods, services and loans are delivered or furnished in the State of Minnesota and payment is made from the State of Minnesota. The District Court, based on a Stipulation of Facts (App. 91), determined that Minn. St. §48.185 was applicable to the Omaha BankAmericard [VISA] program in Minnesota and that respondent must be enjoined from conducting or participating in any bank credit card operations in the State of Minnesota in violation of the statute.

This Court should reverse the Minnesota Supreme Court and order the decision of the District Court to be reinstated. Application of Minn. St. §48.185 to the Omaha BankAmericard [VISA] program does not conflict with or frustrate the policies of the National Bank Act and enforcement thereof will not impose an undue burden on the performance or efficiency of national banks. Similar regulation of interest rates charged in interstate credit transactions has been constitutionally up-

held in the context of non-back credit card programs. *See, Aldens, Inc. v. Packel*, 524 F. 2d 38 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). Minn. St. §48.185 operates in a nondiscriminatory way in setting the rate of interest which may be charged by in-state or out-of-state banks in the operation of credit card programs in the State of Minnesota. On the same rationale applied in *Aldens*, the Minnesota Bank Credit Card Act ought to be sustained as a valid exercise of state regulation. The Minnesota Bank Credit Card Act does not in any way attempt to preclude out-of-state national banks from introducing their credit card programs into the State of Minnesota. Rather, the state statute merely requires that, when operating in the State of Minnesota, out-of-state national banks abide by the same credit card interest rate schedule required of national banks located in the State of Minnesota.

VI

Under 28 U.S.C. §2101(c), the period of time allowed for filing a writ of certiorari is 90 days from entry of judgment. The judgment of the Minnesota Supreme Court became final on December 14, 1977, when judgment was entered in this matter. It is from that date that the 90 days must be counted, and the petition for writ of certiorari filed by Marquette on March 13, 1978, with the United States Supreme Court was timely filed. *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924).

ARGUMENT

I. NATIONAL BANKS ARE SUBJECT TO STATE LAWS UNLESS SUCH LAWS ARE IN CONFLICT WITH OR FRUSTRATE THE PURPOSES OF THE NATIONAL BANK ACT, OR IMPOSE AN UNDUE BURDEN ON THE PERFORMANCE OR EFFICIENCY OF NATIONAL BANKS.

While recognizing that by their very nature national banks are creatures of federal law, this Court has stressed on numerous occasions that national banks are also subject to state legislation except where such legislation:

> "expressly conflict[s] with the laws of the United States or frustrate[s] the purpose for which the national banks were created, or impair[s] their efficiency to discharge the duties imposed upon them by the law of the United States."

McClellan v. Chipman, 164 U.S. 347, 357 (1896). *Accord, Waite v. Dowley*, 94 U.S. 527, 533 (1876); *First National Bank v. Missouri*, 263 U.S. 640, 656 (1924); *Lewis v. Fidelity Co.*, 292 U.S. 559, 566 (1934); *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944).

If Congress has clearly indicated an intent to legislate exactly the same subject matter addressed by the particular state law in issue, such state law must yield to the paramount authority of the federal statute. *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283-84 (1896). *See also, Bank of California v. Richardson*, 248 U.S. 476, 483 (1919); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 559-61 (1963). Thus, those state laws affecting national banks which stand as an obstacle

to, or otherwise conflict with, the manifest intent and purpose of any provision of the National Bank Act are subordinate to the federal law. *Id.* However, the converse to the above rule is also true. That is, in the absence of some showing that the challenged state statute is contrary to Congressional intent and purpose underlying the National Bank Act, national banks are subject to such state legislation. *Lewis v. Fidelity & Deposit Co., supra,* 292 U.S. at 566. *See also, First National Bank v. Kentucky,* 9 Wall. 353, 362-63 (1870); *McClellan v. Chipman, supra,* 164 U.S. at 358-59.

In the area of rates of interest permitted to be charged by national banks, there is no question that, in enacting what is now Section 85 of the National Bank Act (12 U.S.C. §85), Congress established the exclusive standard for determining the rate of interest permitted to be charged by national banks in competition with state banks in the state where the national bank is located. *See, Tiffany v. National Bank of Missouri,* 85 U.S. (18 Wall.) 409, 411-13 (1873); *Daggs v. Phoenix National Bank,* 177 U.S. 549, 555 (1900). Likewise, there is no dispute that, in enacting what is now Section 86 of the National Bank Act (12 U.S.C. §86), Congress has preempted the subject matter of penalties which may be assessed against a national bank for collecting interest at a usurious rate. *See, Farmers' & Mechanics' National Bank v. Dearing,* 91 U.S. 29, 35 (1875); *Hazeltine v. Central National Bank,* 183 U.S. 132, 137 (1901).

At issue in this appeal is whether Congress has preempted state legislation as to the rate of interest permitted to be charged by a national bank in states other than the state where its offices are located. It is a matter of first impression before this Court and, in the context of the Court's prior decisions, involves an analysis of (1) the Congressional purpose and in-

tent underlying 12 U.S.C. §85 and whether Minn. St. §48.185 is in conflict with or frustrates such purpose and intent; and (2) whether the enforcement of Minn. St. §48.185 will impose an undue burden on the performance or efficiency of national banks.

II. THE STATE OF MINNESOTA'S REGULATION OF INTEREST RATES IMPOSED BY OUT-OF-STATE NATIONAL BANKS ON MINNESOTA CONSUMERS DOES NOT CONFLICT WITH THE CONGRESSIONAL INTENT UNDERLYING SECTION 85 OF THE NATIONAL BANK ACT.

A. Congressional Purpose in Adoption of the National Bank Act was to Maintain Competitive Equality Between National and State Banks.

The first clause of 12 U.S.C. §85 provides:

> "Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more . . . " (Add. 1).

This portion of §85 permits a national bank *located* in a state to charge on loans *made* in such state the rate permitted to *general lenders* under the general usury laws of the state.

The second clause of 12 U.S.C. §85 provides:

> ". . . except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (Add. 2).

This clause permits a national bank *located* in a state to charge on loans *made* in that state the highest rate permitted to *state banks* in such state.

The legislative history of §85 reevals that it was designed to insure competitive equality between state and national banks in the charging of interest. *See, Congressional Globe,* 38th Cong., 1st Sess., pp. 2123-27 (1864). This Congressional intent was first confirmed in *Tiffany v. Bank of Missouri,* 85 U.S. (18 Wall.) 409 (1873). The case arose out of a claim of usury asserted by a debtor against a national bank located in Missouri. Under what is now §85 of the National Bank Act, the plaintiff sought to recover from the defendant national bank twice the amount of interest paid on what plaintiff claimed to be a usurious loan. Missouri law permitted general lenders in the State of Missouri to loan money at 10 percent per annum, but restricted Missouri state banks to charging interest at the rate of 8 percent per annum. Plaintiff contended that national banks under §85 of the National Bank Act were restricted to the same rate permitted Missouri state banks and could not charge the higher 10 percent rate permitted general lenders. This Court, in construing what is now 12 U.S.C. §85 (formerly Section 30 of the 1864 Act[6]) stated:

> "The act of Congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where State banks of issue are not allowed a greater. There are three provisions in section thirty, each of them enabling. If no rate of interest is defined by State laws, 7 percent is allowed to be charged. If there is a rate of interest fixed by State laws generally, the banks are allowed to charge that rate but no more; except that if

[6] Act of June 3, 1864, Ch. 106, Section 30, 13 Stat. 108 (1864).

> State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations." *Id.* at 411.

On this basis, the Court held that the national bank in Missouri could charge up to 10 percent per annum, the rate of interest permitted general lenders and was not restricted to the lesser rate of 8 percent allowed state banks under Missouri laws.

In *Tiffany,* this Court was careful to point out that it was the intent of Congress to insure to national banks equal competitive opportunity with state banks in terms of interest rates charged:

> "It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that *it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition.* In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same." (Emphasis added.) *Id.* at 412.

Thus, in adopting §85 of the National Bank Act, Congress sought to preserve and equalize competition between national and state banks.[7]

Section 85, however, was aimed at *intra*state competition, *i.e.*, between national banks located in a state and the other local banks in *that* state:

> "The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and *equality* is carefully secured with *local banks.*" (Emphasis added.)
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> * * *
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> "* * * The intention of the national law is to adopt the state law and permit to national banks what the state law allows to its citizens and to the banks organized by it." (Emphasis added.) *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900).

This same emphasis on *intra*state competitive equality between national banks and other local banks is also seen in leading lower court cases cited under §85. *See, e.g., First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 880 (8th Cir. 1975); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F. 2d 855, 861-64 (6th Cir. 1972); *Hiatt v. San Francisco National Bank*, 361 F. 2d 504, 506-507 (9th Cir. 1966). These cases respectively define the purpose of §85 as follows:

> "Considering the federal statute in its entirety, we clearly see a Congressional intent that *the competitive opportunities of a national bank operating in a certain state should not be impeded by Congressional limitations on interest charges which are more restrictive than state limitations imposed upon the state's banks.*" (Emphasis added.) *Hiatt v. San Francisco National Bank, supra.*
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> "The conclusion is inescapable that the National Bank Act accorded national banks *the right to charge the interest rate afforded their state competitors whether the competitor was a state bank or other non-bank lender.*" (Emphasis added.) *Northway Lanes v. Hackley Union National Bank & Trust Co., supra*, at 864.
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> "The Act reflects a Congressional compromise giving national banks full and complete parity of interest rate regulation with state banks while guarding against unfriendly antifederal state legislation or ruinous competition with state banks. * * * The policy of the pro-national bank faction in Congress in fashioning the Act was to place national banks in a position of limited advantage over state banks by *allowing them to charge interest at the highest rate applicable under state law to lenders generally in each respective state*, not necessarily at the rate applicable to state banks which might be lower." (Emphasis added.) *First National Bank of Mena v. Nowlin, supra*, at 879.
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> * * *

[7] This theme of competitive equalization is found in other parts of the National Bank Act. As the United States Supreme Court pointed out in *Lewis v. Fidelity & Deposit Co., supra*, in discussing taxation of national banks: "The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation." 292 U.S. at 564-65. Furthermore, the court said, this general policy of equalization appears in both original and later provisions and amendments of the Act, as well as related acts, dealing with branching capabilities, exercise of fiduciary powers, interest on deposits, capitalization requirements and powers to loan on mortgage. 292 U.S at 564-65.

"The policy of *competitive state-federal equality in the context of usury regulation* is supported by the District Court's construction of Section 85 which imposes the same interest ceiling on national banks as the most favored lenders in the state, and *thereby puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders.*" (Emphasis added.) *Id.* at 880.

As all of the above quotations clearly indicate, the key consideration of §85 is one of providing "competitive equality" in the context of *intra*state competition between national banks and other lending institutions in the same state. Section 85 itself says nothing that could reasonably be construed as providing a rule as to what interest rate may be charged in the context of *inter*state transactions. The federal statute is simply silent on issue.

B. Interstate Transactions by National Banks Were Not Contemplated in the Currency Act of 1863 or National Bank Act of 1864.

The forerunner of §30 (now §85) of the National Bank Act was §46 of the Currency Act of 1863. It read in relevant part as follows:

"That every association may take, reserve, receive and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, such rate of interest or discount *as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws*

of the several States in which the associations are respectively located and no more." (Emphasis added.) Act of February 25, 1863, Ch. 58, §46, 12 Stat. 678-79 (1863).

Section 46 of the Currency Act of 1863 provided, in effect, that national banks located in a particular state could charge the rate of interest established by the laws of the state in which such national bank was located for general lenders of the state (legal rate); however, national banks were prohibited from taking advantage of the laws of the state in which such national banks were located allowing general lenders to enter into contracts with parties calling for interest at a higher rate (contract rate) than that allowed general lenders of the state absent such a contract.

There was no provision in §46 of the Currency Act of 1863 for the interest rate to be charged by a national bank when it transacted business outside of the state where it was located or chartered. Indeed, Congress did not contemplate that national banks would do business in states other than the state in which they were located or chartered. Section 11 of the Currency Act of 1863 required that a national banking association must conduct its "usual business . . . in banking offices located at the places specified . . . in its certificate of association, and not elsewhere." Act of February 25, 1863, Ch. 58, §11, 12 Stat. 668 (1863). National banks in 1863 were therefore confined to transacting their general or usual business in the city, town or village in the State or Territory or District specified in their organizational certificate. Act of February 25, 1863, Ch. 58, §6, 12 Stat. 666 (1863).

In 1864, Congress enacted the National Bank Act of 1864. The first draft of §30 of the 1864 Act provided for a uniform rate of interest to be charged by national banks, as follows:

"Every association may take . . . interest at a rate not exceeding seven percent per annum . . . ." Congressional Globe, 38 Cong., 1st Sess. 2123 (1864).

However, when §30 came up for debate in the Senate on May 5, 1864, the Senate Committee on Finance immediately recommended the following amendment.

"That every association may take . . . interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more. And when no rate is fixed by the laws of the State or Territory, the bank may take a rate not exceeding seven percent." Congressional Globe, 38th Congress, 1st Sess. 2123 (1864).

This version would have allowed national banks located in a state to charge the legal rate of interest or the contract rate of interest, whichever was higher. If the state or territory fixed no specific rate of interest, a national bank was to be limited to charging a rate not exceeding 7 percent per annum.

The final version of §30, as approved by the House and Senate in 1864 was:

"*That every association may take, reserve, receive and charge on any loan or discount made,* or upon any note, bill of exchange, or other evidences of debt *interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this Act.* * * *" Act of June 3, 1864, Ch. 106, §30, 13 Stat. 108 (1864). (Emphasis added.)

In order to ascertain the intent of Congress in adopting this final version of §30, more than 100 years ago, the Senate debates on Section 30 reflected in the Congressional Globe are revealing. One group of senators, led by Senator Grimes of Iowa and including Senators Henderson of Missouri and Doolittle of Wisconsin, desired to prevent national banks from charging higher interest rates than state banks and thereby gaining a major competitive advantage. *See, Congressional Globe*, 38th Congress, 1st Sess., at 2123-2127 (1864). Another group of senators, led by Senator Sherman of Ohio and including Senators Fessenden of Maine and Trumbull of Illinois, asserted that national banks should be allowed to charge that interest rate which any individual or other institution in the state was allowed to charge, without regard to any limitation which might be placed on state banks.[8] The Sherman group was intent on making it impossible for states to pass legislation hostile to national banks in the area of interest rates. They feared that states might pass a "general rate" applicable to national banks and then allow state banks to be exempted therefrom.[9] The issue was settled by the compromise version of Section 30 that finally emerged which permitted national banks to charge the highest rate of interest permitted general lenders in the state (legal or contract rate) where the national bank was located and also allowed national banks to charge the highest rate allowed state banks in such state if that rate was higher.

It is apparent from examining the various draft changes in the statute and the report of the debate in the Congressional Globe that none of the senators, from either faction, con-

[8] *See*, Comment, *National and State Bank Interest Rates Under the National Bank Act: Preference or Parity*, 58 Iowa Law Review 1250-1267 (1973) at 1254.
[9] *Id.* at 1254-1255.

templated that national banks would open offices in other states or transact business across state lines on an interstate basis. State banks were limited to *intra*state transactions and Congress, in the Currency Act of 1863, had restricted national banks to conducting their general banking business at the place specified in their organizational certificate.[18] Hence, the legislative history which emerged from §30 of the National Bank Act of 1864 is also silent on the question of what interest rates are to be charged in the context of interstate transactions by national banks.

C. The "Plain Meaning" of §85 of the National Bank Act Suggests that Congress did not by §85 Intend to Adopt a Rule on Interest Rates for National Banks in Interstate Transactions.

The current version of §85 is practically identical with §30 of the 1864 Act. Section 85 presently reads:

> "Any association may take, receive, reserve, and charge on *any* loan or discount *made*, or upon any notes, bills of exchange or other evidences of debt, interest at the rate allowed by laws of the State, Territory, or District *where the bank is located* * * * and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for *associations organized or existing in any such State* under this chapter." (Emphasis added.)

In construing the first clause of §85, consideration must be given to the legislative policy of maintenance of competitive

[18] For a general history of the right of state banks and national banks to operate more than one office and engage in branch bank activities, *see*, Fischer, *American Banking Structure* (1968), 8-72.

equality between national banks and state banks which Congress had in mind in adopting the National Bank Act of 1864 and establishing a dual banking system. If the first clause of §85 is construed to mean that the interest rate charged by a national bank on loans made by it in *any* state is limited to that rate which is permitted in the state where it is located, then that national bank, if it is located in a state with low interest rates, will be at a competitive disadvantage in making loans in a neighboring state with a higher rate permitted national banks and state banks in that state. It will not have the same profit opportunity. Banks enjoying higher interest rates can spend more for advertising, afford to give incentives (such as "free" credit cards), take greater credit risks, place more loans on the books than competing banks enjoying less favorable rates, and generally dominate the marketplace (this assumes that the interest rate differential is not so extreme as to drive consumers to the bank with the lowest interest rates). Similarly, if the national bank is located in a state which permits high interest rates, it will have a competitive advantage over national and state banks located in a neighboring state with a lower interest rate, when it makes loans in that neighboring state. Congress in adopting §85 of the National Bank Act could hardly have intended such a result.

The first clause of §85 must be read to refer to the interest rate which may be charged by a national bank on loans *made* where the bank is *located* and would allow a national bank to charge the highest interest rate allowed to general lenders by the laws of the state in which the national bank is "located." The word "located" used in §85 when read in conjunction with the word "established" used in 12 U.S.C. §81 means the state where the national bank is chartered and transacts its

general banking business. In this connection, §85 is similar to many other provisions of the National Bank Act which treat national banks as peculiarly local institutions. *See*, 12 U.S.C. §§30, 33, 34a, 36, 51, 62, 72, 81, 85, 86, and 94; *Cope v. Anderson*, 331 U.S. 461, 467 (1947); *Citizens & Southern National Bank v. Bougas*, —— U.S. ——, 98 S. Ct. 88 (1977).

Nor does the second clause of §85 address the issue of what interest rate is permitted of national banking associations "located", "organized", or "existing" in one state and doing business in a second state. The second clause of §85 permits a national banking association "organized" or "existing" in any state to charge the highest rate permitted state banks in such state, if the rate for state banks is higher than the interest rate allowed general lenders in such state. Use of such words as "located", "organized", and "existing" in §85 all appear to have reference to the same thing, that is, the state where the national bank was chartered and has its general place of business.[11]

[11] It must be noted that the United States Supreme Court in *Citizens & Southern National Bank v. Bougas, supra*, in construing the meaning of the word "located" as found in the National Bank Act venue provision, 12 U.S.C. §94, held that a national bank for venue purposes was "located" not only in the county of the national bank's principal place of business but also in any county in which a national bank conducts business at a branch. Assuming the words "located" and "existing" as found in §85 of the National Bank Act mean essentially the same thing, even if those words are to be given an expanded reading so as to mean the place where the national bank has its principal place of business *or* the place where the national bank conducts any significant business, §85 cannot be read to permit a national bank to export the interest rates of the state where it has its principal place of business (home state) across state lines to a foreign state when it engages in *interstate* transactions. Under an expanded reading of the words "located" or "existing", a national bank engaged in *intra*state transactions would be deemed "located" or "existing" in its home state under §85 and the national bank would refer to the laws of such state for purposes of determining what interest rates may be charged. A national bank engaged in *inter*state transactions would be deemed "located" or "existing" in the foreign state under §85 if it conducts significant business there, and the national bank would refer to the laws of that state for purposes of determining what interest rates may be charged. The results then are the same in terms of whose state laws one looks to, whether one gives the words "located" and "existing" a narrow or broad interpretation under §85.

Hence, the plain language of §85 supports the conclusion that §85 is silent on the issue of what interest rates may be charged by a national bank when it crosses state lines.

D. Lower Court Decisions Concerning Permissible Interest Rates in Interstate Transactions by National Banks.

Other than the Minnesota Supreme Court's decision herein, the only reported cases to reach the conflict of laws issue in the context of *inter*state credit transactions by national banks are: *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La. 1969); and, the two *Fisher* cases, *Fisher v. The First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) and *Fisher v. The First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977).

In the first case to address this issue, the *Meadow Brook* case, the plaintiff national bank, established in the State of New York, brought suit on a promissory note securing a mortgage loan made by plaintiff in the State of Louisiana. One of the defenses asserted by the defendants was that the promissory note was usurious under Louisiana law. The bank argued, however, that, because it was established in the State of New York, §85 of the National Bank Act required the court to look to New York law to determine the maximum interest rate which the plaintiff national bank could charge.

The United States District Court for the Eastern District of Louisiana rejected the bank's argument on the basis that

the federal statute was silent as to conflict of laws in interstate transactions:

> "We hold that 12 U.S.C. §85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; *it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state.*" (Emphasis added.) 302 F. Supp. at 75.

Having concluded that §85 does not address itself to the question of usury with respect to out-of-state loans, the court ruled that Louisiana law governed:

> "[The National Bank Act] fixes the maximum rate of interest to be charged by national banks on loans made in the state where they are located by reference to the law of that state, the purpose being to establish equality with state banks as to the interest rates. *Consequently, loans made in states other than the one where the bank is located ought to be governed by the laws of the state where the loan is made. This establishes equality with state banks in those states as to the interest rates.*" (Emphasis added.) *Id.* at 75.

This brings us to the *Fisher* cases so heavily relied upon by the respondent. The *Fisher* cases involved an Iowa resident who commenced two separate class action suits, one against the First National Bank of Chicago and the other against the First National Bank of Omaha, for alleged antitrust and civil right violations, and statutory damages (under 12 U.S.C. §86) of twice the amount of interest paid by cardholders in Iowa, in connection with BankAmericard programs operated by the two banks in the State of Iowa. At the trial court level,

judgment was entered against Fisher in both cases on grounds unrelated to federal preemption.[12] On appeal, the Seventh and Eighth Circuits cited various reasons for affirming the respective lower court decisions, including the fact that the interest charged by the two banks was within the permissible rates of the State of Iowa as well as the national banks' home states of Illinois and Nebraska. *See*, 538 F. 2d at 1290 and 548 F. 2d at 258. In addition, both appellate courts sought to justify their decisions on the theory that the "most favored lender" doctrine announced in *Tiffany v. National Bank of Missouri, supra*, should be expanded to *inter*state transactions so as to give national banks the privilege of selecting between the highest rate of interest permitted by the state in which it has its principal place of business, or, the highest rate of interest permitted by the state in which the bank transacts business. *See*, 538 F. 2d at 1291; 548 F. 2d at 257-58.

The *Fisher* cases are, in the first instance, distinguishable from the present case in that the respective courts in those cases found the interest rates charged by the subject bank credit card programs to be within the maximum rates of *both* the bank's home state and the transaction state. That is not the situation here.

Likewise, the courts in the *Fisher* cases were not dealing with a state statute specifically setting interest rates to be charged on all bank credit card programs operated in the state as a distinct class of loans. In regulations issued by the Comptroller of the Currency as to §85, it is provided that national banks may charge the highest rate of interest permitted "on a specified class of loans . . . subject only to the provisions

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[12] *See, Fisher v. The First National Bank of Chicago*, No. 74C489 (N.D. Ill. 1975) (unreported), 538 F. 2d, *supra*, at 1287-88; *Fisher v. The First National Bank of Omaha*, No. 72-0-156 (D. Neb. 1975) (unreported), 548 F. 2d, *supra*, at 256-57.

of State law relating to such class of loans that are material to the determination of the interest rate." 12 C.R.F. §7.7310. As noted by the District Court in the instant case:

> "* * * [T]he plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is allowed to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity." (App. 137).

More importantly, in relation to the present appeal, neither the Seventh nor the Eighth Circuit Court was faced in *Fisher* with the critical issue of whether to permit competitive inequality between national banks doing business in the same state. Accordingly, the *Fisher* cases cannot be viewed as authority for the proposition that §85 of the National Bank Act should be permitted to be utilized by a Nebraska-based national bank as a means of coming into the State of Minnesota and importing its home state's higher interest rates when Minnesota-based national banks are limited to the rate permitted by Minn. St. §48.185.

The majority of the Minnesota Supreme Court in relying on the *Fisher* cases failed to perceive that the instant case involves considerations entirely different than those addressed by the Eighth and Seventh Circuits in the *Fisher* cases. What is at stake in the instant case is a determination of whether §85 of the National Bank Act is to be construed as permitting competitive inequality between national banks established in different states but conducting business in the same state. It

also involves a determination of whether §85 of the National Bank Act preempts a state from enacting nondiscriminatory legislation applicable to *all* banks operating bank credit card programs within its borders.

Congress in enacting §85 of the National Bank Act sought to maintain competitive equality between national banks and state banks as to interest rates permitted to be charged by national banks. The Minnesota Supreme Court decision, if allowed to stand, would permit respondent, and its principal, the Omaha Bank, to operate a BankAmericard [VISA] program in Minnesota at an 18 percent interest rate while Minnesota state banks, and national banks located in Minnesota, are limited to an annual interest rate of 12 percent. Furthermore, by permitting national banks located outside of the State of Minnesota to charge an 18 percent rate of interest, such banks would have the competitive advantage of being in a better position to offer their bank credit card "free" (without a membership fee of $15 per annum). Obviously, the *economic* ability to offer a "free" bank credit card gives a bank competitive advantage over banks which are economically unable to do so. If out-of-state national banks are given the power to charge their higher home-state interest rates in low-interest-rate states such as Minnesota, they will, therefore, be given a distinct competitive advantage over national banks located in such low-interest-rate states.

To construe §85 of the National Bank Act so as to find in the plain language of that Act a rule that national banks located in a high-interest-rate state may, by virtue of the National Bank Act, export such rates to a low-interest-rate state completely ignores the policy of "competitive equality" between national and state banks as to interest rates which Congress so carefully built into §85 of the Act. As the dissent in the Minnesota Supreme Court decision states:

"The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act." (App. 169).

Even the majority opinion by the Minnesota Supreme Court recognized that its decision would afford "an advantage which appears to be contrary to the original purpose in adopting this particular section [85] of the National Bank Act" (App. 169) and "inconsistent" therewith (App. 169).

It is submitted, therefore, that the State of Minnesota's regulation of interest rates imposed by out-of-state national banks operating in Minnesota neither conflicts with the laws of the United States nor does it frustrate the purpose for which national banks were created. If anything, Minn. St. §48.185 fosters the Congressional intent of competitive equality underlying §85 of the National Bank Act. Accordingly, the only remaining consideration is whether Minn. St. §48.185 imposes an undue burden on the performance or efficiency of out-of-state national banks.

III. MINNESOTA'S BANK CREDIT CARD ACT IS NOT AN UNDUE BURDEN ON OUT-OF-STATE NATIONAL BANKS.

Absent a reference in the National Bank Act, 12 U.S.C. §85, to the rate of interest which a national bank may charge on loans made in a state other than the state where it is located, what law governs the rate of interest chargeable by that national bank?

Normally, the parties to a loan transaction may, by agreement, choose the interest rate law of one state or the other to apply. The courts will recognize this contractual choice of laws unless the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties choice, or, unless application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. In this latter situation, the state with the more significant contacts with the transaction would be the state of the applicable law. *Restatement (Second) of Conflict of Laws*, §§203, 187 and 188.[13]

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[13] Some commentators have suggested that when §85 of the National Bank Act says that a national bank is limited to the rate allowed by "the laws of the [jurisdiction] where the bank is located," this refers not only to the maximum rate established by the jurisdiction's usury law, but to the jurisdiction's choice-of-law rules. The "laws of the jurisdiction where the bank is located" includes not only statutory laws governing usury, but also common law, conflict-of-laws rules as to which usury statutes apply. *See*, Shanks, *Special Usury Problems Applicable to National Banks*, 87 The Banking Law Journal, 483-501 (1970); Note, *Fisher v. First National Bank of Chicago: 12 U.S.C. §85 is Granted Automatic Extraterritorial Effect*, 32 University of Miami Law Review, 239-254 (1977). If so, given the strong public policy enunciated in Minnesota Statutes, §48.185, calling for application of the Minnesota bank credit card interest rate statute to credit card transactions arising in Minnesota between Minnesota residents and

The Minnesota legislature, in enacting Minn. St. §48.185, has in effect determined that, as a fundamental policy of the State of Minnesota, banks (whether state, national or savings banks) operating bank credit card programs in the State of Minnesota and extending credit to Minnesota residents under such programs shall be limited in the amount and method of computing finance charges:

> "*This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence* an open end credit arrangement specifying:
>
> (a) *that the law of another state shall apply;*
>
> (b) that the person consents to the jurisdiction of another state; and
>
> (c) which fixes venue;
>
> *is invalid with respect to open end credit transactions to which this section applies.* An open end credit arrangement made in another state with a person who was a resi-

local or foreign banks, such statute would presumably be applied, whether the forum state was Minnesota or Nebraska. *See, Restatement (Second) of Conflict of Laws*, §§203, 187, 188; *Kinney Loan & Finance Co. v. Sumner*, 159 Neb. 57, 65 N.W. 2d 240 (1954); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W. 2d 408 (1973).

> dent of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction." (Emphasis added.) Minn. St. §48.185, Subd. 6.

The District Court, as part of its Findings of Fact, Conclusions of Law and Order for Judgment, found that the Omaha Bank and respondent have or intend to engage in the systematic and continuous solicitation of Minnesota residents to induce them to open an Omaha BankAmericard [VISA] credit card account; that retail merchants and banks in Minnesota are or will become contractually bound to honor BankAmericard [VISA] credit cards issued by the Omaha Bank; that goods, services and loans are or will be delivered or furnished to Minnesota residents through use of such credit cards in this State, and that said Minnesota residents will pay for such goods and services or loans by remitting payments for same to the Omaha Bank. *See*, Paragraphs IV, V, VI, and VIII, Findings of Fact, Conclusions of Law, and Order for Judgment (App. 125). In view of such Findings of Fact, the District Court determined that Minn. St. §48.185 was applicable to the Omaha BankAmericard [VISA] program in Minnesota and that the respondent must be enjoined from conducting, or participating in, any bank credit card operations in the State of Minnesota in violation of the statute.

Similar regulation of interest rates charged in interstate credit card transactions has been constitutionally upheld in the context of non-bank credit card programs. *See, Aldens, Inc. v. Packel*, 524 F. 2d 38 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Aldens, Inc. v. LaFollette*, 552 F. 2d 745 (7th

Cir. 1977), *cert. denied*, —— U.S. —— (1977). The Third Circuit in the first *Aldens* case held that regulation by the Pennsylvania Goods and Services Installment Sales Act of the finance charges imposed by out-of-state companies on Pennsylvania residents does not violate the United States Constitution. A Chicago, Illinois, mail order house contended that Pennsylvania could not determine the maximum rate the mail order house could charge for credit purchases by Pennsylvania residents. However, the court found that Pennsylvania had a substantial interest in determining the maximum charges its residents had to pay and so there was no violation of constitutional due process. 524 F. 2d at 43-44.

The *Aldens* case is of particular significance herein due to the fact that, like Minn. St. §48.185, the Pennsylvania statute also has its own conflict of laws provision specifying Pennsylvania law to be controlling upon out-of-state sellers soliciting the business of Pennsylvania residents. The court found this conflict of laws provision to be constitutionally permissible not only as to due process but also under the commerce clause of the United States Constitution. It held that so long as the Pennsylvania statute operated in a nondiscriminatory way toward both in-state and out-of-state companies doing business in the state, it was a valid exercise of state regulation. *Id.* at 45-46. Likewise, the court indicated that in this age of usury laws and consumer credit statutes, it could not be said that the Pennsylvania regulation of finance charges put an undue burden on interstate commerce.

Similarly, Minn. St. §48.185 operates in a nondiscriminatory way in setting the rate of interest which may be charged by in-state and out-of-state banks (regradless of whether state or national banks) in the operation of credit card programs in the State of Minnesota. On the same rationale applied in

Aldens the Minnesota Bank Credit Card Act ought to be sustained as a valid exercise of state regulation. Moreover, the statute ought to be applied regardless of any purported agreement between the out-of-state bank and the Minnesota resident, pursuant to which the Minnesota resident agrees that the laws of the out-of-state bank may be applied. This is the only way to insure competitive equality between out-of-state lenders operating in Minnesota and in-state lenders, *i.e.* if both are required to abide by the same interest rate schedules.

Nor will the functions of the Omaha Bank, or any other national bank, be destroyed or unreasonably hampered by the enforcement of Minn. St. §48.185. In this regard, the recent entry by the Omaha Bank into the Minnesota market in apparent compliance with Minn. St. §48.185 (Add. 6) evidences that it has the administrative capability to operate the Omaha Bank-Americard [VISA] program at 12 percent in Minnesota while at 18 percent in Nebraska. Likewise, the Court may take judicial notice of the fact that other out-of-state national banks are operating in Minnesota at 12 percent while at the same time operating their programs in their home state and other states at higher rates of interest.

As this Court noted in *McClellan v. Chipman, supra*:

> "Of course, in the broadest sense, any limitation by a State on the making of contracts is a restraint upon the power of a national bank within a state to make such contracts; but the question which we determine is whether it is such a regulation as violates the [National Bank Act] of Congress." 164 U.S. at 358.

The Minnesota Bank Credit Card Act does not in any way attempt to preclude out-of-state national banks from introducing their credit card programs into the State of Minnesota. Rather, the state statute merely requires that, when operating in the

State of Minnesota, out-of-state national banks abide by the same credit card interest rate schedule required of national banks located in the State of Minnesota. If an out-of-state national bank is to enjoy the opportunity to conduct business in the State of Minnesota, it should also be required to comply with the same nondiscriminatory laws to which national banks located in Minnesota are bound.[14]

IV. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

Pursuant to the direction of the Court, petitioner addresses the following argument to the matter of timeliness in filing the petition for writ of certiorari in Case No. 77-1265. This question is governed by the following provision of 28 U.S.C. §2101(c) (Add. 11):

> "Any other appeal or *any writ of certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be* taken or *applied for within 90 days after the entry of such judgment or decree.* * * *" (Emphasis added.)

While the Minnesota Supreme Court filed its opinion (App. 154) in this matter on November 10, 1977, the judgment of

[14] An analogous situation, where national banks are deemed to be controlled not only by the laws of the state where their principal office is located but also by the laws of the states where they do business, is in the exercise of trust powers. 12 U.S.C. §92a. In 1964, the Comptroller of the Currency ruled that:

> "a national bank with fiduciary powers may exercise them in another state or county *if the bank conforms to the laws of that jurisdiction.*" (Emphasis added.)

Ruling of Comptroller of the Currency, 1 National Banking Review 610 (1964); CCH Fed. Banking L. Rptr., ¶58,713.40. *See also*, the Regulations of the Comptroller of the Currency defining the fiduciary powers of national banks as those certain powers not in contravention with the local law of the state governing the fiduciary relationship. 12 C.F.R. §§9.1(d) and (h).

the Minnesota Supreme Court was not entered until December 14, 1977. It is from this latter date that the 90-day time limit of 28 U.S.C. §2101(c) begins to run. Accordingly, the Petition for Writ of Certiorari filed in Case No. 77-1265 on March 13, 1978 was timely by reason of being filed 89 days after entry of judgment by the Minnesota Supreme Court.

It should be noted that following the filing of the Minnesota Supreme Court opinion, this petitioner filed a petition for rehearing (App. 172) which automatically stayed entry of judgment. Minnesota Rules of Civil Appellate Procedure, Rule 140 (Add. 9). By Order dated December 8, 1977, the Minnesota Supreme Court denied said petition for rehearing (App. 197). On December 14, 1977, judgment of the Supreme Court of the State of Minnesota was entered (App. 198), pursuant to Rule 136.02 of the Minnesota Rules of Civil Appellate Procedure (Add. 9).

Relying principally upon *Citizens Bank of Michigan City v. Opperman*, 249 U.S. 448 (1919), respondent argued in its Brief in Opposition to the Petition for Writ of Certiorari herein that the decision of the Minnesota Supreme Court became "final" on December 8, 1977 with the filing of its order denying petition for rehearing. Admittedly, if the Minnesota Supreme Court's judgment has been entered *prior* to the petition for rehearing, it would make sense under 28 U.S.C. §2101(c) to compute the 90 days from the date of denial by the Minnesota Supreme Court of the petition for rehearing since, under such circumstances, there would have been no further act necessary to make the judgment final. However, the Minnesota Rules of Civil Appellate Procedure do not follow the practice adopted by the Federal Rules of Appellate Procedure and by some states in providing for entry of judgment prior to a petition for rehearing, and hence, *Citizens Bank of Michi-*

gan City v. Opperman, supra, and the other cases relied upon by respondent, are inapposite.

Rule 136.02 and Rule 140 of the Minnesota Rules of Civil Appellate Procedure (Add. 9) are substantially different from Rules 36 and 40(a) of the Federal Rules of Appellate Procedure (Add. 10). The Clerk of a federal Circuit Court of Appeals, under Rule 36, must prepare, sign and *enter* the judgment upon receipt of the opinion of the court and must mail on the date judgment is entered a copy of the opinion, if any, and notice of the date of entry of the judgment. Under Rule 40(a) of the Federal Rules of Appellate Procedure, a petition for rehearing must be filed within 14 days after *entry of judgment*. Minnesota Rules of Civil Appellate Procedure, Rules 136.02 and 140, provide that a petition for rehearing *stays entry of judgment* and judgment shall be entered only after the petition for rehearing is decided.

This Court made clear in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924) that where state law provides for entry of judgment only after the highest state court has decided a petition for rehearing, the time for filing a petition for writ of certiorari under 12 U.S.C. §2101(c) runs from the date of entry of the judgment.

The *Puget Sound* case involved the filing of a petition for writ of error to the Supreme Court of Washington. The petitioner had appealed a dismissal of his complaint by the trial court to the Supreme Court of Washington and the latter court heard the matter first in department and then *en banc*. The second department of the Supreme Court of Washington rendered its opinion on October 15, 1921. The case was then argued before the court *en banc*, which, in a per curium opinion filed June 12, 1922, approved the decision of the second

department and affirmed the trial court judgment. On July 10, 1922, judgment of the Washington Supreme Court was entered in the minutes of the court. 264 U.S. at 23-24. In opposition to a petition for writ of error to this Court, it was argued that the time for computing the 90 days began to run from the filing of the Washington Supreme Court's *en banc* decision on June 12, 1922 (rather than from the date of judgment entered on July 10, 1922) and that the period for filing a writ of error thus expired on September 12, 1922.

The above argument was, however, rejected on the basis that, under the laws of the State of Washington, a decision of the department of the Supreme Court of Washington did not become final until 30 days after it was filed, during which time a petition for rehearing could be filed; that if no rehearing was asked for, or no order entered for a hearing *en banc* within the 30 days, the decision became final; that if a hearing *en banc* was ordered and had, the decision was final when filed; but that, in all cases when the decision became final, there was a specific provision that a judgment shall issue thereon. 264 U.S. at 24-25. Since the state statutory procedure contemplated the entry of judgment by the Supreme Court of Washington after the decision, this Court held that "however final the [*en banc*] decision may be, it is not the judgment." 264 U.S. at 25. Therefore, the time for appeal was determined to run from the date of entry of judgment rather than the date of the final decision.

In so holding, this Court in *Puget Sound* also answered the additional argument raised herein that, since the judgment of December 14, 1977 was entered by the Clerk of Court, it should be viewed as an insignificant ministerial act:

> "It is said that the [entry of judgment] is a mere formal, ministerial entry of a clerical character, whereas the

real judgment is the final decision. Whatever the effect of the distinction in the procedure of the state, which counsel seeks to make, *we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress* of September 6, 1916 [predecessor statute to 28 U.S.C. §2101(c)] fixing the time in which writs of error must be applied for and allowed." (Emphasis added.) 264 U.S. at 25.

Similarly, in the context of the instant case, there is no reason to doubt that that which the Minnesota Rules of Civil Appellate Procedure calls the judgment is the judgment referred to in 28 U.S.C. §2101(c). *See, e.g.*, Minnesota Rules of Civil Appellate Procedure, Rules 136.02, 137.01, 137.02 (Add. 9).

CONCLUSION

The decision of the Minnesota Supreme Court that §85 of the National Bank Act preempts Minn. St. §48.185 and prohibits the State of Minnesota from regulating interest rates charged Minnesota residents by out-of-state national banks engaged in bank credit card transactions in the State of Minnesota conflicts with the doctrine of maintenance of competitive equality between state and national banks adopted by Congress in enacting §85 and is contrary to the legislative history of §85 and the plain meaning of the Act. In view of the foregoing, and the fact that the petition was timely filed, this Court should reverse the decision of the Minnesota Supreme Court and order it to reinstate the judgment of the District Court granting partial summary judgment and permanently enjoining respondent from engaging in any activity in connection with the offering or operation of its bank credit card program in the State of Minnesota in violation of Minn. St. §48.185.

Respectfully submitted,

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BEARMON & ROTMAN
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J. Patrick McDavitt
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The Marquette National
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ADDENDUM A

UNITED STATES CONSTITUTION, ARTICLE VI

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ADDENDUM B

TITLE 12, UNITED STATES CODE, SECTION 85

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal

reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. §5197; June 16, 1933, c. 89, §25, 48 Stat. 191; Aug. 23, 1935, c. 614, §314, 49 Stat. 711.

ADDENDUM C

MINNESOTA STATUTES 1976 SECTION 48.185

Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant

to Chapter 50 may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed $7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed $5,000, nor shall it extend such credit for any purposes other than personal, family or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed $15 per annum, payable in advance, for the privilege of using a bank credit card which entitles the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank

or savings bank and charged to the debtor's open end loan account with the bank or savings bank:

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on the balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

(a) that the law of another state shall apply:

(b) that the person consents to the jurisdiction of another state; and

(c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the re-

quirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.
Added by Laws 1976, c. 196, §5, eff. April 9, 1976.

ADDENDUM D

Letter dated May 25, 1978, from William E. Morrow, Jr. to Warren Spannaus, Minnesota Attorney General

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LAW OFFICES
SWARR, MAY, SMITH & ANDERSEN
3535 Harney Street
Omaha, Nebraska 68131
(402) 341-5421

May 25, 1978

Honorable Warren Spannaus
Attorney General
State of Minnesota
St. Paul, Minnesota 55155
Attention: Jean E. Heilman, Special Assistant
and T. Triemert, Complaint Analyst—File No. 78-025-1997
Dear Sir:

Our client, the First National Bank of Omaha, has received letters under date of May 18 and May 19 from your office concerning complaints filed with you by Robert J. Stiever and Victor P. Reim. Mr. Reim appears to be president of Commercial State Bank at Fifth Street at St. Peter in St. Paul, Minnesota. Mr. Stiever's address is 1460 North Chatsworth Street, St. Paul, Minnesota.

Both of these letters express inquiry concerning the Visa and Master Charge Credit Cards issued by First National Bank of Omaha.

Mr. Stiever inquires whether the application is of deceptive quality and apparently complains in that the application for a credit card contains an agreement by the proposed cardholder to read and comply with the terms of an agreement which terms are not disclosed to him in advance. Mr. Reim indicates that the letter is misleading in that it says nothing about "the 18% interest rate on the outstanding balance".

We have elected to respond to both of these complaints with this single reply since they involve basically the same reasoning and the same materials.

As you are aware, the First of Omaha Service Corporation, a subsidiary of First National Bank of Omaha, is presently involved in litigation, to which your office is a party, in an effort to establish that the First National Bank of Omaha is entitled to charge rates allowed by Nebraska law. The Supreme Court of Minnesota has indicated that the First National Bank of Omaha is so entitled, however its order is stayed pending review in the Supreme Court of the United States. The Supreme Court of the United States has granted certiorari and the matter will presumably be submitted to them some time in the fall of 1978.

Under those circumstances, it was not possible at the time of commencing this solicitation, to advise prospective cardholders of the rates which would be charged. It is and has been the intention of First National Bank of [illegible] to charge Nebraska rates as soon as the courts have [illegible]ed that it may do so. Until such time, First National Bank of Omaha intends to charge rates not exceeding 1% per month on the outstanding balances. As a matter of fact, the rates which will be charged to Minnesota residents during the interim period until the Supreme Court of the United States rules, will be less than those authorized by the Minnesota statute.

Federal Truth-in-Lending laws and regulations require that all of the details be disclosed to cardholders prior to the first transaction on the account. To the extent that applications are received and approved and cards issued, those statutes and regulations will be complied with and the information concerning charges et cetera will be furnished to the individuals with their cards. If at that point Mr. Stiever finds that the terms and conditions are burdensome or unacceptable to him, he will of course be absolutely free to simply return the card, thereby eliminating any obligation he may have under any supposed agreement. Mr. Reim, on the other hand, will at that point in time be in possession of appropriate facts which will permit him to evaluate his position and either renew or drop his complaint based upon facts rather than upon assumptions in which he is apparently indulging.

If the State of Minnesota or your office finds this procedure unacceptable during the time the matter is pending in the Supreme Court of the United States, please advise us and we will undertake to meet whatever reasonable requirements or requests you may have.

In view of the pending litigation, which appears to raise the same issues and questions as raised by these complaints, we assume that any action which your office elects to take will be consistent with and perhaps even a portion of that litigation.

Very truly yours,
WILLIAM E. MORROW, Jr.

WEM/jk
cc: James Doody
Clay Moore

ADDENDUM E

Rules of Minnesota Appellate Procedure

Rule 136.02 Entry of Judgment; Stay

The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment.

Rule 137.01 Judgment Roll

In all cases the clerk shall attach together the bond and notice of appeal certified and returned by the clerk of the trial court and a certified copy of the judgment of the Supreme Court, signed by him; and these papers shall constitute the judgment roll.

Rule 137.02 Execution; Issuance and Satisfaction

Executions to enforce any judgment of the Supreme Court may issue to the sheriff of any county in which a transcript of the judgment is filed and docketed. Such executions shall be returnable within 60 days from the receipt thereof by the officer. On the return of an execution satisfied in due form of law the clerk shall make an entry thereof upon the record.

Rule 140. Petition for Rehearing.

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted.

Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of $25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs.

ADDENDUM F

Federal Rules of Appellate Procedure

Rule 36. Entry of Judgment

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 40 (a) Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain

such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

ADDENDUM G

Title 28, United States Code, Section 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.